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DOCTRINE IN VIRGINIA AS TO THE DUTY OF A RAILROAD COMPANY TO LICENSEES ON ITS TRACKS.

The recent case of the Norfolk and Western R. R. Co. *v.* Stegall's adm'x, decided at the June term of our court of appeals, 1906, and reported in 54 S. E. 19, may have come as a surprise to some of the profession whom former decisions of our court of appeals had led to believe that railroad companies owe a different degree of care to licensees from that which they owe to mere trespassers.

A brief review of the Virginia decisions on this point is the object of this paper. This review does not pretend to be complete or exhaustive, but it is believed to be sufficient to show that a step has been taken in this case not exactly to have been anticipated by the prior decisions of the court.

The facts and decision in the *Stegall case* are briefly these: Stegall was walking on a trestle of defendant company, which the public was, with the defendant's consent, accustomed to use as a pathway. Defendant backed a train over the trestle, keeping no lookout, and at a rate of speed which was contrary to the ordinances of the city of Bristol, and in so doing struck Stegall, and killed him. It is remarked by the court that the gravamen of the second count in the declaration is that the defendant company was negligently pushing its train of cars in front of the engine across the trestle, with no lookout upon the end of the cars, and at a rate of speed forbidden by the city ordinance. In sustaining the demurrer to this second count, Judge Whittle says: "The doctrine is settled by repeated decisions of this court, that a railroad company does not owe the duty of prevision to a bare licensee upon its track; nor does it owe him the duty of employing competent servants to manage its trains, or to run them in a particular manner, or at a particular rate of speed, 'the general rule being that a bare licensee * * *. is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the

business carried on there.'" Citing 2 Shear & Red. on Negligence, § 705; Nichols Admr. *v.* R. Co., 85 Va. 102; Gillis *v.* Penn. R. Co., 98 Am. Dec. 317; Holland, etc., *v.* Sparks, 92 Ga. 753, 18 S. E. 990.

The court then holds that, this being so, the declaration does not state a good cause of action against the defendant company, since it does not aver that it intentionally or willfully injured him, or that, after it saw or knew of his danger, or by the exercise of ordinary care could have avoided injuring him, it failed to do so. To sustain this proposition the court cites the following cases holding that a railroad company does not owe to a licensee the duty of blowing its whistle, ringing its bell, running its engine at a particular rate of speed, or having a light on its engine: C. & O. R. Co. *v.* Roger's Adm'x, 100 Va. 324; Williamson *v.* Southern R. Co., 51 S. E. 195. The court then concludes: "It is clear, therefore, from the authorities, that the defendant was not guilty of contributory negligence in pushing the train in question over its trestle, and was under no obligation to keep a lookout on the end of its cars, or, in anticipation of decedent's presence on the trestle, to provide for his safety." It is further held by the court that, while it was the duty of the defendant company to observe the speed ordinance of the city of Bristol, the alleged violation of that ordinance is so commingled with the alleged dereliction of duty in the company to keep a lookout that it "does not conform to the reasonable rule of pleading applicable to this class of cases, which requires that the duty alleged to be owing from the defendant, and the acts of negligence relied on, shall be stated with sufficient particularity and clearness to enable the defendant to understand the nature of the charge that he is called upon to answer."

Let us take up briefly the cases cited by the court as authority for the proposition that a railroad company owes no duty of prevision to a bare licensee, and that a trespasser and a bare licensee, in so far as recovery by them for injury is concerned, occupy the same position.

In Gillis *v.* Penn. R. Co., 98 Am. Dec. 317, a crowd had gathered on a railway platform to see President Andrew Johnson come through. The platform was defective and broke down, and suit was brought by a person injured. It was held, that

such a person, though not technically a trespasser, being a bare licensee, the railroad company was not liable to him for its negligence and that it did not owe to him the duty of keeping its platform in repair. This case deals only with *prevision* and does not seem to be authority for the proposition for which it is cited in the *Stegall case,* except as to that part which deals with *prevision.* As has been said, it does not deal with the question of keeping a lookout in places where the public is accustomed to use the track, but deals solely with the question of *prevision,* the difference between which and a *lookout* we shall attempt to distinguish below.

In the case of Holland, etc., *v.* Sparks, 92 Ga. 753, 18 S. E. 990, a trespasser walking within twenty feet of a railway company's track, was injured by the train *jumping the track.* The court held, that, even though the coincidence of the train jumping the track was due to running at an unusual rate of speed, the railroad company owed no duty to trespassers in unfrequented places to keep its trains under the control which it is its duty to maintain at points where the public have a right to be or to travel.

The only Virginia case cited by the court in the *Stegall case* to sustain the proposition that a railroad company owes to licensees no duty of keeping a lookout to discover them is Nichol's Admr. *v.* W. O. & W. R. R. Co., 83 Va. 99, and we do not think that this case is authority for the rule for which it is cited save remotely and by way of *dictum.* It appears that an approach to the company's station, used by the public with the acquiescence of the defendant, led over a track on which cars were frequently standing. Nichols, while on his way to the station, came to this track, found the cars standing about eighteen inches apart, attempted to squeeze through, and, the cars being suddenly shunted together, was killed. Defendant company was held liable on the ground that, directly or indirectly, the public had been invited to use this approach, and that Nichols was not a bare licensee. Not being a bare licensee, the court was not called upon to state the law as to licensees, but the following expression was used regarding them: "Now it is agreed on all hands that there is a wide difference between the obligation which a person or corporation owes to a mere licensee, and the duty which the same

person or corporation owes to one who comes upon his premises by an invitation either express or implied. In the first case it is generally admitted that the party comes at his own risk, and enjoys the license subject to its concomitant risks or perils, and that in such cases no duty is imposed upon the owner or occupant to keep his premises in safe or suitable condition for his use, and the owner or occupant is only liable for any wanton injury that may be done to the licensee." Apart from the fact that this is *dictum,* this statement is clearly made by the court with reference to *prevision,* or preparation, and the duty of keeping a lookout to discover the presence of licensees is not mentioned. Indeed, it was in no way involved in the case.

We have now considered the cases which the court cites to sustain its decision in the *Stegall case,* and we believe, though with deference be it said, that only the quotation from Shearman & Redfield on Negligence sustains the court in the broad proposition which it lays down as to the equality of trespassers and licensees. It is not necessary to consider the statement quoted. For, what the general rule may be is a question foreign to this discussion. We are only concerned with what is, or what has been, the rule in Virginia, and the only way to ascertain this is by the Virginia cases in point.

Blankenship *v.* C. & O. R. Co., 94 Va. 449, 27 S. E. 20, was a case where plaintiff was killed while on the tracks in the yard of defendant company. The uncontradicted evidence showed that defendant knew that hundreds of men, women, and children, were passing over and along its tracks in the yard daily. It was further shown that the engineer of the train which killed the plaintiff was engaged in other duties, and was not keeping a lookout for persons upon the tracks. Judgment was given for the plaintiff in the court of appeals, and the court, speaking through Judge Buchanan, said: "There seems to be a recognized distinction in the degree of care which a railroad company owes under ordinary circumstances to a trespasser, and to one who is upon its right of way by the license of the company. In a case like the one at bar, however, where the company knows that its right of way at a certain point is constantly used as a footway by hundreds of men, women, and children, passing on it daily and at all hours, its servants are charged with notice that it is

so used; and whether the persons who are so using it are trespassers or licensees, the railroad company cannot without fault proceed in a manner which must necessarily be dangerous to such persons." The court thus bases its decision on the ground of the duty of reasonable care which the railroad company owes to all; recognizes the doctrine that a higher degree of care is due to licensees than to mere trespassers—see first sentence quoted above—and states the rule to be that a lookout must be kept for *all* persons whom "it might reasonably expect to be on its tracks at that point." This case is not cited by the court in the *Stegall case*. Can it be reconciled with the latter case? If it is overruled it is by implication only.

In the case of Va. Mid. R. R. Co. *v.* White, 84 Va. 498, plaintiff, a licensee upon the tracks of defendant company, stepped off of a side track onto the main track to avoid a material train, and was killed by a yard engine and tender. The engine was not visible when he came on the track, but was around a bluff, and backing rapidly within city limits, in the direction decedent was walking, and at a speed in excess of that prescribed by the ordinances of the city. The engineer failed to look out, blow the whistle, or to give any warning. It was held, that this evidence showed a clear case for the plaintiff. "The deceased was not a trespasser but a licensee, and whatever duty a railroad company may owe to a trespasser on its tracks, a different rule applies to a licensee. As to the latter the rule is that the company is bound to exercise ordinary care and prudence toward him, for the license creates the duty," and, "it was the duty of the engineer to use ordinary care, not only *after* discovering the dangerous position of the deceased, but in *keeping a lookout* to warn him of the approaching danger." (Italics ours.)

This case is remarkably similar in its facts to the *Stegall case*. In both cases a licensee was killed by a backing train, on the rear of which no lookout was kept, and in both cases the train was violating a city ordinance in its manner of running. In neither case did the duty of *prevision*, as we understand it, arise. Both cases dealt with the duty of keeping a lookout under such circumstances. The decisions are radically different, and the *Stegall case* without citing the *White case*, applies a doctrine which some of the later Virginia cases announce as to *prevision*

to the wholly different state of facts which was before the court in the former case, and makes a rule, in this original application somewhat drastic, apply to circumstances to which it before had been a stranger.

In passing, it may be said that this decision seems, moreover, to be at odds with the *Stegall case* relative to the fact that the train was being run in a manner contrary to a city ordinance (a common feature of both cases). The court in the *Stegall case* held, as we have seen, that negligence not having been shown in other particulars, the fact of the illegal running of the defendant's train could not be held to create liability, as it was not shown to be the proximate cause of the injury. In the *White case, supra,* in considering the evidence that the bell was not rung, and that the speed was in excess of that prescribed by the city ordinance, the court said: "He had a right to rely on the performance of their duties by the agents of the defendant, and to suppose that in frequented places within the city limits * * * they would obey the ordinance above mentioned, both as respects the signals, and the speed it prescribes. By their failure to do so they doubtless lulled him into a fatal belief of security, and there can be but litte doubt that had they performed their duties, the deceased would not have been injured." This was held to be a case of gross negligence, and the company was held liable. The distinction between *prevision* and the duty of discovery is not made in this case, and a Wisconsin case is approvingly quoted which held a railroad company liable for the explosion of a boiler whereby a licensee was injured Davis *v.* Chicago & N. W. R. Co., 58 Wis. 646.

In the case of C. & O. *v.* Rogers, Adm'x, 100 Va. 324, Rogers was killed while passing over a trestle which was used by the public, with the acquiescence of the railroad company. In this case an instruction was objected to on the ground that it devolved upon the railroad company the duty to use reasonable care to *discover* and to avoid injuring *trespassers* upon its tracks. The court, while admitting that the instruction would be erroneous if applied to the case of a trespasser, says: "The instruction under consideration, however, when applied to the facts of the case at bar, is free from objection. The uncontradicted evidence shows that this trestle or bridge had been in constant

and daily use as a walkway for some years for a large number of persons in that vicinity, and that this use was well known to the company and its employees. Under these circumstances, it is immaterial whether Rogers was a trespasser or a licensee, for in either case it was the duty of the company to use reasonable care to *discover* and not to injure persons whom (whether they were trespassers or licensees) it might reasonably expect to be on its tracks at that point;" citing Blankenship *v.* R. Co., 94 Va. 449. It will be noticed that in this case reasonable care under the circumstances was made the test of liability, and the court while stating that an instruction making care to discover a trespasser a duty was erroneous, says that this was not so in the case at bar, where the defendant company had reasonable ground to suspect the presence of persons upon its tracks. It appears from the evidence in this case that the plaintiff was a licensee, and the "reasonable expectation" of the presence of persons on a track at a given point, at all times in general, and on no particular occasion, would seem to presuppose as a concomitant condition that such persons were licensees. It was held in this case that the plaintiff had no right to rely on a signal, used solely for the company's benefit, whereby lights were shown on the trestle to warn trains whether such trestle was open for traffic or not. This, as bearing upon the duty of *prevision*, is probably the point for which the case is cited by the court in the *Stegall case, supra.*

In Williamson *v.* So. R. Co., 51 S. E. 195, it was held, that a bare licensee walking along a railroad track at night could not recover from the railroad company on the ground that the engine running him down had no headlight. That, considering the circumstance that the plaintiff was a licensee, "it was the duty of the company to use reasonable care to discover and not to injure persons whom it might reasonably expect to be on its tracks at that point," but that "a railroad company owes no duty of *prevision* to a bare licensee. It is under no obligation to make preparation in advance for his protection. Its sole duty is to use reasonable care to *discover* and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. As said in *Wood's case, supra,* such a person is only relieved from the responsibility of being a tres-

passer, and takes upon himself all the ordinary risks attached to the place and the business carried on there." In this case the duty of *discovery* seems to have been admitted without question, and a well-defined distinction is drawn between the duty of *prevision* and "care to discover;" the former not being due to a licensee, while the latter is.

From the sense in which prevision is used in this case it seems to mean preparation, or, "the duty of provident circumspection which foresees and forestalls danger," and to be used rather with reference to the *means* of running, and the appliances used in the operation of a railroad, than in connection with the *manner* of running. To mean that the company does not owe the licensee the duty of preparation to discover and protect him (*prevision*), yet with "things as they are," with such appliances as are actually in use, it must exercise "reasonable care to discover and protect." This is practically what was said in the *Rogers case, supra,* at page 334; and in the *Williamson case,* while the company did not owe the plaintiff the duty of providing a headlight to enable it to see him (*prevision or preparation*), it did owe him the duty to look out for him with such appliances as it had in actual use– to discover and protect. Yet even in the statement used above in the *Williamson case* there seems to be inconsistency, for if "such a person (i. e., a licensee) is only relieved from the *responsibility* of being a trespasser, and takes upon himself all the ordinary risks attached to the place and the business carried on there" this case would seem to go the length of the *Stegall case* which actually applied this statement of the law to the facts under the consideration of the court; but, as has been seen, the duty of keeping a *lookout to discover* the presence of licensees was flatly laid down in this case as a rule of law, whereas it is a well settled doctrine in Virginia that a railroad company owes no duty of keeping a lookout to discover trespassers. Seaboard & Roanoke R. Co. *v.* Joyner's Admr., 92 Va. 354; Tucker's Admr. *v.* N. & W. R. R. Co., 92 Va., 549.

It was argued in the *Williamson case, supra,* that the decision in the *Rogers case, supra,* approving an instruction that defendant owed to plaintiff no duty of having a headlight on its engine, merely decided that to run an engine without a headlight was not negligence *per se,* without regard to whether such headlight

was necessary to the maintenance of a reasonable lookout, "that it would be a strange and striking contradiction, if not a curious absurdity, to announce it to be the duty of a railroad company to keep a reasonable lookout, and at the same time to hold that it could so envelope itself in darkness as to prevent its performance of such clearly-stated duty." This argument is rejected by the court on the ground of its rule as to *prevision*, and it is said "to maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees." But, if the argument *ab inconvenienti* applies, does not the "strange and striking contradiction" remain?

But perhaps this view may be reconciled on the theory that in such a case the doctrine of prevision, or preparation, and the rule that a lookout must be kept for licensees, overlap, and that, where to keep such a *lookout* would entail the duty of *prevision*, the negative rule will apply, and the lookout need only be in accordance with the circumstances. In short, that *such* a lookout to discover must be made as is compatible with the appliances and conveniences in use in the particular case. This seems to be the view of the court in the above case.

In the case of N. & W. R. Co. *v.* Wood, 99 Va. 156, 37 S. E. 846, Wood was injured by a passing freight train while he was standing on a station platform as a licensee, and the declaration based his right of recovery on the ground that the railroad company was using improper machinery, brakes, and appliances. The court, in sustaining the demurrer to this declaration, uses the following language: "Being there as a bare licensee the defendant did not owe him the duty of maintaining its roadbed, switches, and connecting appliances, in proper condition for running its trains; or of providing and using proper and safe tracks, couplings and machinery on its cars; or of properly inspecting the same; or of employing competent servants to manage its trains; or to run them at a proper rate of speed. The general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad—is only relieved from the responsibility of being a trespasser, and takes upon himself all the ordi-

nary risks attached to the place and the business carried on there. 2 Shear. & Red. Neg., § 705; Nichol's Admr. *v.* R. Co., 83 Va. 102, 5 S. E. 171, and cases cited; Gillis *v.* R. Co., 59 Penn. St. 129; Holland *v.* Sparks, 92 Ga. 753, 18 S. E. 990."

This is clearly a case of prevision and not of keeping a lookout to discover licensees, and the same doctrine as to this duty is here laid down which the court later enunciates in the *Williamson case, supra;* and here, for the first time, we find the rule placing trespassers and licensees, in so far as recovery by them is concerned, upon the same footing; but with the express qualification of extending the rule only to the case of prevision, as is seen by the language interjected above—"that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes, in no way connected with the railroad."

The rule as to trespassers and licensees is quoted in the *Stegall case* and the same authorities cited to support it, but with what an extended application, and in what a different sense will be readily seen. In the *Wood case,* just quoted, it is used as to the duty of prevision, and the duty of discovery is in no way involved. In the later case of Williamson *v.* So. R. Co., *supra,* the same language is quoted, but most clearly it can be meant to apply only to the duty of prevision; only to mean that the railroad company did not owe to a licensee that duty of provident circumspection and of careful preparation, which it owes only to passengers. For in that case the duty of maintaining a lookout to discover the presence of licensees on a railroad track is expressly maintained. But in the *Stegall case* licensees and trespassers are, so far as recoveries for injuries is concerned, put upon the same footing; the distinction between prevision and the duty of posting a lookout to discover licensees is done away with. It is laid down as an absolute rule that a railroad company does not owe even to licensees the duty of trying to discover them upon its tracks; and all this without any reference to *Blankenship's case, surpa, White's case, supra,* or any of the earlier Virginia cases which have so clearly stated the law to be that reasonable care is the duty which a railroad company owes, at the least, in *all* cases, to *all* persons; that what is reasonable care depends on the circumstances; that not keeping a lookout

for possible trespassers upon its tracks is not such an omission of reaonable care as will make a railroad company liable; but that the duty of using reasonable care to discover them *is* due to licensees, who from the fact that their presence is acquiesced in by the railroad company, occupy toward such company a higher position than do mere trespassers, and are entitled to a greater protection by the law.

If the court intends in the future to follow the doctrine of the *Stegall case* in its full extent, we shall have two lines of Virginia cases, substantially agreeing so far as the duty of prevision is concerned, but, it is earnestly contended, completely at variance as to the duty of a railroad company to keep a lookout for licensees upon its tracks.

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Bedford City, Virginia,
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